INDEX

CITATIONS

738798—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1128

MORRIS HEFLER, GEORGE LEVY AND AL LEVY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 493–497) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered February 13, 1947 (R. 497). The petition for a writ of certiorari was filed March 14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code,

as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the proof of petitioners' knowledge of the stolen character of the goods they received is sufficient to sustain the verdict.

2. Whether it was adequately established that the goods involved were stolen from a vehicle while in interstate commerce.

3. Whether the trial judge abused his discretion in denying a motion for a new trial.

4. Whether evidence was admitted which tended to suggest guilt of unrelated crimes.

5. Whether irrelevant and prejudicial evidence of the true value of the stolen goods was admitted.

STATUTE INVOLVED

Section 1 of the Act of February 13, 1913, 37 Stat. 670, as amended by the Act of January 28, 1925, 43 Stat. 793, and the Act of January 21, 1933, 47 Stat. 773 (18 U. S. C. 409), provided in part as follows at the time of the offense involved here:[1]

> * * * whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, wagon, automobile, truck, or other vehicles,

[1] This statute was again amended by the Act of July 24, 1946, c. 606, § 1, Pub. Law 534, 79th Cong., 2d Sess.

> * * * any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express, or shall buy or receive or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both, * * *.

STATEMENT

An indictment in one count, filed March 25, 1946 (R. 1), in the District Court for the Southern District of New York charged that petitioners Hefler and George Levy, on or about June 8, 1945, received goods which had been stolen from a motor truck while moving as an interstate shipment of freight, knowing them to have been stolen, in violation of 18 U. S. C. 409, *supra* (R. 5). A second indictment charging substantially the same offense and involving the same goods was returned against petitioner Al Levy on July 17, 1946 (R. 3, 6). The indictments were consolidated for trial (see R. 330). Petitioners were found guilty after a jury trial (R. 1, 339). On November 15, 1946, Hefler and George Levy were sentenced to four, and Al Levy to fourteen months' imprisonment (R. 2, 3, 480).[2] On appeal to the Circuit Court

[2] We have been advised by the Bureau of Prisons that Hefler and George Levy were discharged by reason of completion of service of their sentences on March 14, 1947. *Quare*, whether under *Fiswick* v. *United States*, No. 51, this Term, decided December 9, 1946, slip opinion, pp. 8–11, this circumstance renders the case moot as to them.

of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 497).

In view of the nature of the contentions urged in the petition for a writ of certiorari, it is unnecessary to recite the evidence. The nature of the proof is indicated in the opinion below (R. 494) and in the Argument herein.

ARGUMENT

1. Petitioners contend that the evidence of their knowledge of the stolen character of the goods is insufficient to sustain the verdict (Pet. 12, 14–21). As the court below pointed out (R. 494), however, the government witness Kaufman, from whom they purchased the goods, repeatedly testified that he told them the transaction was not "legitimate" and that the goods were stolen (see R. 31, 35, 49, 50, 52, 57). As the court below also pointed out, this testimony was corroborated by a number of circumstances (R. 494). Obviously, petitioners' denial of their guilty knowledge presented merely a factual issue for the jury to determine.

2. It is further contended that there was no proof that the goods were stolen while in interstate commerce or from any of the places specified in the statute (Pet. 12, 21–34). It was stipulated at the beginning of the trial, however, that the goods were stolen while in interstate commerce by a truck driver named Sullivan, who was employed by a contract hauler for the Pennsylvania

Railroad, and that Sullivan sold them to one Fisher (from whom Kaufman purchased them, see R. 20, 32) (R. 7–10).[3] While the prosecuting attorney was attempting to frame an adequate stipulation, petitioners' attorney repeatedly interrupted him, and it is evident from the remarks made that the latter intended to concede that the theft itself was one within the proscription of the statute and that the only issue was petitioners' knowledge of the stolen character of the goods (R. 8–9). This is confirmed by the fact that the court, without objection, charged the jury that "It has been stipulated by both sides in this case that these particular goods were stolen while they were a part of or constituted an interstate shipment of freight or express, so that that particular issue is in no way involved in the case to be decided by the jury" (R. 331). While it is true that the stipulation did not state in so many words that the goods were removed from a truck, a trucking company and the fact that the thief was a truck driver are mentioned. Where the intention to concede the conformity of the theft to the terms of the statute appears so clearly, the

[3] While jurisdiction as such cannot be conferred on a court by consent of the parties (*Neirbo Co.* v. *Bethlehem Corp.*, 308 U. S. 165, 167), facts which show jurisdiction may be conceded, contrary to petitioners' implied assertion (Pet. 33), and a court may act judicially upon such an admission. *Railway Company* v. *Ramsey*, 22 Wall. 322, 327. Otherwise, a plea of guilty could never be accepted.

stipulation, though deficiently worded, should suffice, we think, to remove this question from further consideration, particularly since that phase of the required proof was never questioned at the trial. Moreover, as the court below observed (R. 495), if, as the stipulation conceded, the goods were stolen while in interstate commerce, the theft necessarily occurred after they were loaded on the truck driven by Sullivan, for only then did they get into the stream of commerce; and confirmation that they were "unlawfully taken" from the truck was supplied by Fisher's testimony that the goods were transferred to his premises by Sullivan from the latter's truck (R 18).

Here, as in the court below, petitioners attach great significance to the fact that in the course of formulating the stipulation, defense counsel, in reply to the prosecutor's question, "Stolen from whom?" replied, "From the consignor" (R. 9). It is argued that this shows that the goods were stolen before they entered interstate commerce. As the court below pointed out, however, if defense counsel intended his reply to have the meaning now attributed to it by petitioners' present counsel, he was deliberately tricking the prosecutor and the court into believing that a necessary element of the crime had been conceded when it had not (R. 495). In view of the express concession that the goods were stolen while in interstate commerce, the obvious meaning of the fur-

ther stipulation that they were stolen from the consignor was merely that they were the consignor's goods, not that the consignor had possession of them at the moment of the theft. As the court below further remarked, the goods could properly be described as the consignor's goods even though the general property had passed to the consignees and only a security title reserved by the consignor (R. 496).[4]

---

[4] A cognate contention is that the trial court erred in refusing to issue a writ of habeas corpus ad testificandum to have Sullivan brought from the Lewisburg Penitentiary in order that he might testify in aid of petitioners' motion for a new trial (Pet. 13, 39–41). The testimony they hoped to elicit was that he formed the intent to steal the goods before he received them from the consignor. Petitioners maintain that such testimony would have established, contrary to the stipulation, that the goods never entered interstate commerce (R. 373–374, 466–467). Thus, having stipulated at the trial that the goods were stolen while in interstate commerce in order "to save time" (R. 8) and get to the only issue they desired to contest, *viz.*, their knowledge of the stolen character of the goods, and having had this issue resolved against them by the jury, they then, on motion for a new trial, and through a new attorney (see R. 4), sought to reopen a question which they had originally voluntarily removed from the case. Refusal to sanction this tactic was obviously not an abuse of discretion on the part of the trial judge. Cf. *Jones* v. *United States*, 72 F. 2d 873, 874 (C. C. A. 7). The judge, it is true, did make the remark, strongly relied on by petitioners, that he would deny the application for the writ "on the grounds of jurisdiction" (R. 469). What the judge meant by the remark is somewhat obscure, since immediately thereafter he added, "And I think from what I have already said that I will also deny the application at this time to take the testimony of Sullivan or to bring him up," which would indicate that he was denying the application as a matter of dis-

3. Petitioners also contend that the trial judge abused his discretion in denying their motion for a new trial on the ground of newly discovered evidence (Pet. 13, 34–38), consisting of proffered testimony by an alleged newly discovered witness, Golkow, that he was present when Kaufman delivered the goods to petitioners, and that Kaufman did not, as he testified, make known to petitioners the stolen character of the goods (R. 356–358). The trial judge, however, accorded petitioners a two-day hearing during which Golkow was extensively examined (R. 385–451), and reached the conclusion that his testimony was false and would not have changed the verdict (R. 463–466). A perusal of Golkow's testimony on cross-examination (R. 400–449) suffices, we think, to show that the trial judge was amply warranted in denying the motion.

4. Petitioners assert that evidence tending to suggest the commission by them of other crimes was erroneously received (Pet. 13, 41–44). There

---

cretion. In view of the fact that in the colloquy immediately preceding the judge's remark, petitioners' counsel had been insisting that if Sullivan should testify as it was hoped he would, his testimony would show that the court, by reason of absence of the interstate element, "had no jurisdiction" (see R. 467, 469), it would seem that the judge merely meant that he was not impressed with counsel's argument relative to the lack of jurisdiction. It should be noted that the judge's jurisdiction to issue the writ was at no time questioned. See *Gibson* v. *United States*, 53 F. 2d 721 (C. C. A. 8), certiorari denied, 285 U. S. 557, in respect of the power to issue such a writ, effective in another district.

is nothing in the contention. Detective Rosenfeld, who arrested petitioner Hefler and seized all of the stolen goods here involved that were found on the premises of Hefler and petitioner George Levy (R. 105–106), testified that he seized certain other property at the same time. Asked why he had done so, the witness replied, "Because I felt that those may be the proceeds of other larcenies." (R. 111.) From this, petitioners argue that the prosecutor was seeking to imply that they were guilty of other unconnected crimes. That such was not his purpose, however, is clear from the context, and it was only defense counsel's objections which made it impossible for the prosecutor to show the relevance of the evidence. What he was attempting to do, as the context indicates, was to show that the stolen goods were handled differently from other merchandise, and that the legitimacy of the other merchandise could be clearly established. That the prosecutor was not attempting to suggest to the jury that the other goods seized were also stolen is clear from Rosenfeld's testimony on cross-examination that he returned the other goods to Hefler and George Levy after having found that they had come by them legitimately (R. 117). In view of this testimony, it is absurd to say that petitioners were prejudiced.

5. Finally, petitioners contend that various portions of the testimony relative to the value of the stolen goods was erroneously received (Pet. 13,

44–47). The true value of the merchandise involved, leather jackets, was obviously relevant as bearing on petitioners' knowledge of its stolen character.

(a) Petitioners, who were jobbers, had paid Kaufman $4 per jacket (R. 31, 55). On redirect examination, Kaufman testified that at the time $5.50 would have been a fair price for a jobber to receive from a retailer or another jobber, and that the retail price was between $9 and $10 (R. 61). Petitioners contend that the testimony as to the retail price was irrelevant because petitioners were jobbers, and that it was prejudicial because it imparted to the jury the impression that they purchased a $10 article for $4 (Pet. 46). No objection on either score was registered at the trial. In any event, in respect of its alleged irrelevance, as the court below observed (R. 496), petitioners' counsel first raised the question of retail value on cross-examination (R. 52–53). And it is difficult to perceive wherein the disputed testimony could have been prejudicial, since the witness had just previously stated that the jobber-to-retailer or jobber-to-jobber price was $5.50.

(b) Hefler and George Levy sold some of the jackets at $5.75. Mrs. Weiss, the controller of the purchasing firm, testified that she was familiar with the prices her firm was paying on the open market to jobbers and manufacturers for the type of jacket purchased from these two petition-

ers, and that the prices ran "around 6.75." (R. 148–150.) Thus, contrary to petitioners' assertion (Pet. 46), she was clearly qualified to testify in respect of prices paid by her firm, and her testimony was relevant.

(c) Petitioners' objection (Pet. 46–47) to the testimony of a partner in the firm from which the jackets were stolen that the firm's ceiling price for the jackets was from $5.50 to $6 (R. 89) is equally baseless, since such testimony had obvious relevance in respect of the true value of the jackets.

CONCLUSION

The petition for a writ of certiorari does not present any question meriting further review by this Court. We therefore respectfully submit that it should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

APRIL 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947